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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

P. D. GEORGE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 595

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit,

and

BRIEF IN SUPPORT.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Supreme Court of the United States:

The petitioner, P. D. George, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in cause styled: "P. D. George, Petitioner, v. Commissioner of Internal Revenue, Respondent," affirming the decision of The Tax Court of the United States.

JUDGMENT AND APPLICATION FOR CERTIORARI.

The judgment of the United States Circuit Court of Appeals was entered on July 17, 1944 (R. p. 54), and this petition is filed within three months thereafter.

STATEMENT OF THE CASE.

On December 23, 1939, petitioner created a trust, naming himself and two other individuals, Fred S. Henderson and Joseph S. Malecek, as trustees. Neither Henderson nor Malecek is related to petitioner (R. pp. 11, 30, 32). Petitioner transferred to the trustees 640 shares of capital stock of the P. D. George Company, a Delaware corporation.

Prior to the creation of said trust, the petitioner owned all of the 1,000 shares of the P. D. George Company stock. In addition to the transfer of the 640 shares to the trust for the benefit of his sons, the petitioner, about the same time, transferred 60 shares of such stock by direct gift to six of his sons (R. p. 31).

The trust instrument provided, inter alia, that the assets thereof were to be divided into seven parts. The income of the first of such parts was to be paid to grantor's son, Pericles F. George, in quarterly or other convenient installments for life, or in certain eventualities to his wife and children, and on his death the corpus was to be distributed to his then living children and to the descendants of any child then dead, per stirpes. The entire net income of the remaining six parts was to be paid to the six other sons equally in quarterly or other convenient installments until five years after the death of the petitioner, at which time the corpus of those parts, then remaining, was to be distributed to the six sons or, in the event of the death of any of them before the period of termination, to his descendants, per stirpes (R. pp. 34, 35).

The trust is irrevocable. **The grantor could not make any amendment or change by which any of the income could become payable to him or for his benefit, or held or accumulated for him, or any of the principal could be paid to him or for his use or benefit.** Under Article Six of the trust instrument, the grantor reserved the right (subject to the limitation mentioned) upon notice (1) to substitute other beneficiaries in place of those named; (2) to add to

the number of the beneficiaries and to direct the distribution of income or principal otherwise than as provided in the trust instrument; (3) to alter or cancel the amount of income or principal to be distributed to or applied to the use of any of the beneficiaries; (4) to direct distribution of any share to a beneficiary who might then be entitled to the current income (R. pp. 36, 37).

The reserved powers of the grantor could be exercised only by instrument signed by him and delivered to the trustees, but (1) no change or amendment **became effective until thirty days** after such instrument was delivered, (2) the amendment applied only to income derived **after** the amendment became effective, that is, the right of the beneficiaries to income derived before the amendment became effective could not be taken away from them (R. p. 37).

The petitioner has never exercised any of his said powers (R. p. 13).

When the trust agreement was executed (1939), the youngest of the petitioner's sons was twenty-nine years of age and the oldest was forty-three years of age. For many years prior to 1939, and continuously since, the seven sons have been married and living apart from the petitioner and apart from each other. During 1939 and for many years prior thereto, each of the seven sons had an independent income, in addition to his share in 1939 of the trust income, and maintained himself and his family (R. pp. 13, 14).

The income of the trust involved in this controversy covering the year 1939 was all received by the trustees within thirty days after the trust was created. All of the net income of the trust so received was distributed to the named beneficiaries (R. p. 31).

The Tax Court held that all of the net income of the trust estate was includable in petitioner's income for the year 1939 (R. pp. 10-24).

On appeal, the United States Circuit Court of Appeals for the Eighth Circuit, in opinion entered July 17, 1944, affirmed the decision of The Tax Court (R. p. 54).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 939, 28 U. S. C. A. 347. *Helvering v. Clifford*, 309 U. S. 331; *Helvering v. Stuart*, 317 U. S. 154.

STATUTE INVOLVED.

The Federal statute involved is Section 22 (a) of the Internal Revenue Code and is as follows:

> "Section 22. Gross Income.
>
> "(a) **General Definition.**—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and Judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income."

DECISION OF LOWER COURT.

The Circuit Court of Appeals decided that petitioner remained the substantial owner of the trust property because he retained power to substitute beneficiaries, add to the number of beneficiaries, and direct current distribution of the trust property to the then income beneficiaries. Petitioner did not control the trustees and did not control the administration of the trust property and could not use any power in such manner as to derive for himself any economic benefit from the corpus or income, and his power did not extend to the income in controversy.

QUESTION PRESENTED.

Whether the grantor of an irrevocable trust enduring for his life, who has retained the power to change beneficiaries and accelerate the distribution of the corpus to the beneficiaries of the trust but may not benefit economically through any power, remains owner of the trust property so that all the income is his and taxable to him under Section 22 (a) of the Internal Revenue Code; notwithstanding (1) that he has parted with the power to administer or control the administration of the trust and (2) that the grantor is without any dependent, so that there is no intimate member of his family for whose benefit he could use his power, and (3) (subsidiary thereto) his power was so limited that it did not extend and never could have extended to the income involved in the controversy.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

(A) The Circuit Court of Appeals has decided an important question in conflict with the applicable decisions of this Court. The question is whether the right of a grantor in trust to appoint the use of the trust property

to others than himself (with no other rights as to the trust property or income) is equivalent to ownership.

In *Helvering v. Clifford*, 309 U. S. 331, the Court held that the grantor of that trust retained all of the rights of an owner and therefore the trust was without substance. **None of the criteria of ownership found in the Clifford case exist in this case** (*Pearce v. Commissioner*, 315 U. S. 553). "Economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme" (*Helvering v. Stuart*, 317 U. S. 154).

Petitioner could derive no economic gain from his power to change beneficiaries (*John Stuart*, 2 T. C. 1103).

(B) The decision in this case is in conflict with the decisions of the Second Circuit in *Knapp v. Hoey*, 104 F. (2d) 99, and in *Commissioner v. Buck*, 120 F. (2d) 775, and the decision of the First Circuit in *Commissioner v. Bateman*, 127 F. (2d) 266.

No other Court of Appeals has held a retained power to change the beneficiaries **alone** (where the beneficiaries were not intimate members of grantor's family and the grantor did not possess, individually or as trustee or through control of the trustees, power to control administration of the corpus) made the grantor, after his irrevocable transfer to the trustees, the owner of the corpus and taxable on its income. A power of appointment of trust property retained by the grantor does "not amount to an estate or interest in the property." His interest is the same as that of a donee of a power (*Porter v. Commissioner*, 288 U. S., l. c. 441; *Commissioner v. Bateman*, supra).

(C) The decision in this case is in conflict with the decisions of the Second Circuit in *Commissioner v. Jonas*, 122 F. (2d) 169; the Third Circuit in *Helvering v. Bok*, 132 Fed. (2d) 365; the Tax Court in *Dunlevy-Milbank*, 41 B. T. A. 1014; the Tenth Circuit in *Jones v. Norris*, 122 F. (2d) 6; and the Sixth Circuit in *Central National Bank*

of Cleveland v. Commissioner, 141 F. (2d) 352. The power of grantor did not extend to the income involved in this case or to the interest in the corpus out of which such income arose. It was an unalterable trust during that short period, and there was no reversion in the grantor.

II.

This Court should take jurisdiction of this case for the further reason that it alone can clarify its position. The Treasury's interpretation of the decision in the *Clifford* case, sustained by many of the lower courts, has destroyed the statutory code, formerly the guidance. Congress, taxpayers, and the lower courts have no guidance,—a corrosive situation under national **taxation**, particularly when the rates are so high.

Congress cannot act with discretion, because it cannot discover the governing criteria. Examples are Section 134 of the 1943 Revenue Act, which is in conflict with the law as stated in the Court of Appeals' decision in this case; and Section 111 of the 1942 Act, amending Section 22 (b) (3), which undermines its basis and is destructive of the fabric of the law. Only this Court can solve this snarl.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,783, P. D. George, Petitioner, v. Commissioner of Internal Revenue, Respondent, and that the said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner

may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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